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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 260

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, ET ALS.,
Petitioners,

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC.,
a corporation, *et als.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' SUPPLEMENTAL MEMORANDUM

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The character of the respondents' opposition necessitates the submission of a few clarifying words in reply.

1. At the trial that followed the first appeal, petitioners were under the compulsion of the "law of the case" enunciated by the first opinion below (2 R. 206-210). They were therefore not free to make the basic contention, advanced on the first appeal and now renewed, that the restraint of trade proved on the present record entitled them to judgment as a matter of law.

2. Similarly, on the second appeal petitioners unsuccessfully urged the court below to reverse its first opinion, which had totally excluded from consideration the effect on competition of the change made in respondents' by-laws five days before petitioners entered into their first market season—although such by-laws had previously been in effect for 36 years.

3. In our view, which is set forth in the petition at length and hence will not be repeated now, the change in respondents' by-laws so stifled competition beyond possibility of argument or contradiction that only a question of law remains on this record.

4. Respondents' attack on the foregoing conclusion is based on assertions that lack record support.

Thus, respondents assert that there is evidence in the record to rebut petitioners' computation that it would take them 27 years to obtain 36.36 per cent of the selling time on the Douglas market (Br. Opp. 14). There is no such evidence. Respondents cite "(2 R. 633-634)", but examination of that reference reveals nothing more than two charts showing total poundage sold by the several warehouses.

Those charts bear no relationship whatever to petitioners' demonstration that it would take them over 27 years to attain to the competitive position that would have been theirs under the by-laws that had been in effect for over a generation prior to their entry into the market.

Similarly, respondents assert that on blocked days the farmers had a choice as to warehouses (Br. Opp. 13-14). But respondents' own testimonial admissions establish precisely the contrary (2 R. 504, 523).

5. Consequently, we believe that we are on solid ground in contending that on the present record there is nothing for a jury to decide any more than there remained a factual issue in *Associated Press* v. *United States*, 326 U.S. 1,

6. But even if we should be wrong, even if conceivably a material or significant issue of fact were in some manner still required to be litigated, we submit that such litigation should not be had until after this Court has reviewed the conflicting holdings below and clarified the standards and the rules of law to be applied at a retrial. Petitioners believe that they should not be forced to retry the facts until this Court has authoritatively formulated the governing principles, as the court below assuredly has not done despite two appeals.

7. While we believe that this case warrants review for the reasons already stated, and because of its impact on auction sales of tobacco throughout the country (Pet. 19), it is appropriate to emphasize that notwithstanding respondents' suggestion to the contrary (Br. Opp. 20), there is in fact a conflict between the Fourth and Fifth Circuits as to the proper approach, so that the growers and sellers of flue-cured tobacco in Georgia are governed by a rule different from that which now governs other growers and sellers of the same tobacco in the Carolinas.

A. The court below on the first appeal condemned the 3½% limitation (Pet. App. A20-A21); the Fourth Circuit in *Asheville Tobacco Board of Trade, Inc.* v. *F.T.C.*, 263 F.2d 502, 512, similarly condemned such a limitation on authority of that decision; and then the court below in a change of heart decided on the second appeal that the effect of the 3½% limitation presented a jury question (Pet. App. A35-A36).

B. The Fourth Circuit said (263 F.2d at 511) that "The evidence clearly supports the condemnation of the new warehouse provision in connection with the 3½% gain or loss proviso," while the court below on the second appeal held (Pet. App. A38) that whether the combination of the two was unreasonable presented a jury question.

C. The court below on both appeals held that the new warehouse provision was reasonable as a matter of law

and hence lawful (Pet. App. A13-A15, A37-A38), while th Fourth Circuit held, differing from the Federal Trade Co mission (263 F.2d at 511), that the effect of the new war house provision, standing alone, was unclear.

Plainly, then, clarification by this Court of the principle involved is well night imperative.

8. Accordingly, we urge the Court to grant the petitio for certiorari in this case.

Respectfully submitted.

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